

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RANDY L. BREWER)	
Claimant)	
VS.)	
)	Docket No. 227,034
AFG INDUSTRIES, INC.)	
Respondent)	
AND)	
)	
NATIONAL UNION FIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the November 12, 1998 Award entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument on May 26, 1999.

APPEARANCES

Derek R. Chappell of Ottawa, Kansas, appeared for the claimant. Timothy G. Lutz of Overland Park, Kansas, appeared for the respondent and its insurance company.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The parties stipulated that claimant injured his right arm in a work-related accident on or about June 20, 1995. After finding that claimant's injury did not require him to miss a week from work, the Judge denied the request for permanent partial disability benefits. The Judge did not comment upon claimant's request for an award of \$375 in unauthorized medical benefits.

Claimant contends the Judge erred by failing to find that claimant was disabled for a period of at least one week from earning full wages at the work at which he was employed. Claimant argues two theories: (1) that as a result of this injury he only worked 18 of the 48 hours that were scheduled for the week of his surgery and, therefore, he earned less than full wages for that week, and (2) that for approximately five weeks following surgery he worked on light duty using his left hand only performing a different job and different duties than he was doing at the time of the injury. Claimant requests the Appeals Board to find that

he has a 15 percent functional impairment to the right upper extremity. Additionally, claimant requests an award of \$375 for the unauthorized medical services provided by Dr. Sergio Delgado.

Conversely, respondent and its insurance carrier contend the Judge's denial of permanent partial general disability benefits should be affirmed. Alternatively, if any permanent partial disability benefits are awarded, they argue in their brief to the Board that the Award should be based upon a 2 percent functional impairment rating for the right upper extremity. Additionally, they argue claimant should be awarded only \$250 in unauthorized medical benefits as they contend \$125 of Dr. Delgado's bill represents the time that he spent preparing and writing his medical report.

The issues before the Board on this appeal are:

1. Was claimant disabled for a period of at least one week from earning full wages at the work at which he was employed?
2. If so, what is the nature and extent of injury and disability?
3. Is claimant entitled to be reimbursed, as unauthorized medical expense, the doctor's charges for writing the medical report that sets forth the doctor's findings and conclusions from a medical examination requested by claimant's attorney?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Randy L. Brewer began working for AFG Industries, a flat glass producer, in August 1990. Mr. Brewer worked in the quality control and cutting department where his job was to operate the computer and equipment that cuts the glass. Additionally, he manually separated the glass after it was scored.
2. Mr. Brewer is right handed. His job required the use of his right arm to adjust and move the score runners that cut the glass. Also, the job required Mr. Brewer to use both hands to pull samples of glass from the conveyor line, some of which weighed more than 100 pounds. According to the history that Mr. Brewer later provided Dr. Sergio Delgado, the job was repetitive in nature.
3. In early April 1995, Mr. Brewer stepped on a piece of glass while descending some steps, slipped, and twisted his right arm when he caught himself on some nearby railing. After that incident, Mr. Brewer continued to work but noticed the soreness in his elbow was gradually worsening. On or about June 20, 1995, Mr. Brewer decided he needed to see a doctor and he requested medical treatment. At the regular hearing, the parties stipulated that Mr. Brewer had a work-related accident and injury.

4. After the request for medical treatment, AFG Industries sent Mr. Brewer to Occupational Health in Olathe. After reviewing x-rays of the wrist and elbow, the doctor diagnosed tendinitis and prescribed electric stimulation treatment. That treatment continued until August 1995 when Mr. Brewer was then referred to Dr. Daniel D. Schaper, a board certified orthopedic surgeon.

5. Dr. Schaper treated Mr. Brewer between August 21, 1995, and May 21, 1997. He diagnosed lateral epicondylitis in the right arm. After a period of conservative treatment, which included among other things cortisone injections and physical therapy, on January 14, 1997, the doctor did a tennis elbow release.

6. Dr. Schaper's records do not disclose the restrictions he placed upon Mr. Brewer immediately after surgery. But Mr. Brewer testified that he attempted to return to work. The doctor's release form dated January 22, 1997, indicates that Mr. Brewer was released to work using the left hand only for six weeks. On March 6, 1997, the doctor released Mr. Brewer to light work using the right arm. And in April 1997, the doctor released Mr. Brewer to full duties without restrictions.

7. Because of continuing elbow problems following surgery, at his attorney's request Mr. Brewer saw Dr. Sergio Delgado for a second opinion. Dr. Delgado is a board certified orthopedic surgeon and served as a consultant for the fourth edition of the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides).

8. Dr. Delgado initially examined Mr. Brewer in October 1997. In addition to Mr. Brewer's complaints of burning and aching in the right elbow, the doctor's examination revealed loss of grip strength, numbness around the surgical scar, and tenderness in the area of the annular ligament, which is the ligament that holds the radial head. The doctor diagnosed chronic lateral epicondylitis and recommended an MRI and additional surgery. For that examination, the doctor charged \$375 which, according to the doctor, is allowed by the workers compensation medical fee schedules. One-third of the doctor's time was spent preparing the medical report setting forth his findings and recommendations.

9. Dr. Delgado saw Mr. Brewer a second time in February 1998. The doctor again recommended surgery to explore the annular ligament and the lateral muscle mass. After considering the operation and the odds of success, Mr. Brewer declined.

10. Dr. Schaper testified that Mr. Brewer has a 2 percent functional impairment to the right arm considering the third edition of the AMA Guides. But Dr. Schaper acknowledged that the Guides do not "accurately provide" tables and rating procedures for the type of injury that Mr. Brewer sustained. Further, the doctor acknowledged that the surgery was a failure if Mr. Brewer's elbow complaints and symptoms were real. In that event, the doctor agreed that the 2 percent functional impairment rating was too low.

11. Conversely, Dr. Delgado testified that Mr. Brewer's functional impairment to the right arm was 15 percent according to the revised third edition of the AMA Guides. Dr. Delgado found a 5 percent impairment for pain and 10 percent for residual grip weakness.

Dr. Delgado recommends that Mr. Brewer avoid activities requiring repetitive gripping and pinching, particularly with the arm extended, and avoid lifting greater than 25 pounds using the right arm and 50 pounds using both arms.

12. One of the principal issues in this proceeding is whether Mr. Brewer missed sufficient time from work to receive permanent partial disability benefits. The day before his January 14, 1997 surgery, Mr. Brewer worked only 6 hours of his scheduled 12 hour shift. He testified that his doctor told him to be well rested before surgery; therefore, he only worked from 7 p.m. to 1 a.m. that evening. Although scheduled, Mr. Brewer did not work at all on January 14. Mr. Brewer was next scheduled to work 12 hours on both January 17 and January 18. But instead of working the entire 12 hour shifts, he only worked 6 hours on both days. Although scheduled to work 48 hours the week of surgery, he only worked 18 hours. But AFG paid Mr. Brewer for 48 straight time hours, 30 of which were designated as "allowed time".

13. In addition to missing work for surgery, Mr. Brewer later missed an unspecified amount of time from work to attend doctor's appointments. But he did not miss work to attend physical therapy because he was able to schedule those sessions around his job.

14. After surgery and while restricted to using the left hand only, which lasted for at least six weeks, Mr. Brewer worked in the same department but did a different job and performed different duties that were lighter and easier than his regular job that he was doing at the time of the injury.

CONCLUSIONS OF LAW

1. Mr. Brewer injured his right elbow while working for AFG Industries. The accidental injury arose out of and in the course of employment. The parties stipulated that June 20, 1995, was the appropriate date of accident for this claim.

2. For the date of accident involved in this claim, the Workers Compensation Act provides that an employer is not liable for permanent disability benefits for an injury that "does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed".¹

3. Mr. Brewer was disabled for more than one week from the work at which he was employed. Even if he continued to work and earn the same hourly wage after his surgery on January 14, 1997, he was not earning the wage *at the work at which he was employed*. The purpose of the qualification in K.S.A. 44-501(c) is to remove certain minor injuries from eligibility for a permanent disability award. In this case, Mr. Brewer was limited to doing light duty work using his left arm only for more than the requisite one week period. Where an injury requires one-handed work, lighter work, or accommodations for one week or more, the

¹ K.S.A. 44-501(c).

injured worker should be eligible for permanent disability benefits if the evidence otherwise establishes that the injury caused permanent impairment.

4. The Board finds that Mr. Brewer is entitled to receive benefits for a 15 percent impairment to the right upper extremity. That conclusion is based upon the opinions of Dr. Delgado, whom the Board finds more persuasive than Dr. Schaper.

5. Mr. Brewer is entitled to an award and reimbursement in the sum of \$375 for the unauthorized medical services provided by Dr. Delgado. That amount includes the time the doctor spent in writing and preparing his medical report, which the Board finds to be an inherent part of the medical evaluation process and properly reimbursable.

AWARD

WHEREFORE, the Appeals Board modifies the November 12, 1998 Award to award Mr. Brewer permanent partial disability benefits for a 15 percent functional impairment to the right arm and \$375 in unauthorized medical benefits for the services provided by Dr. Delgado.

Randy L. Brewer is granted compensation from AFG Industries, Inc. for a series of accidents through June 20, 1995, and the resulting 15% functional impairment to the right arm. Mr. Brewer is entitled to 62.25 weeks permanent partial disability at the maximum rate of \$319 per week for a total award of \$19,857.75, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board adopts the remaining orders contained in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Derek R. Chappell, Ottawa, KS
Timothy G. Lutz, Overland Park, KS

Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director